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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 197

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Appellant,

versus

V. RIVERA S. en C.,
Appellee.

Appeal From the Supreme Court of Louisiana.

BRIEF ON BEHALF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, APPELLANT, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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New Orleans, La.
July 12, 1947

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I.

BASIS OF JURISDICTION.

This appeal taken under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)) from a final judgment of the Supreme Court of Louisiana entered May 26, 1947 (not yet reported),

is predicated on two assigned errors made by that Court, each of which is believed to present a substantial Federal question.

II.

STATEMENT OF CASE.

This suit was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana (Opinion, p. 1). The plaintiff was V. Rivera S. en C.; the defendants were Texas and New Orleans Railroad Company and Bienville Warehouses Corporation. The suit grew out of three shipments of rice from Crowley, Louisiana, under through export bills of lading issued by defendant Railroad as initial carrier (Opinion, pp.1-2). The Bills of lading, each dated January 25, 1941, provided that the rice would move from Crowley to New Orleans, Louisiana, by defendant's railroad, and thence by steamers of the Waterman Steamship Corporation to Aguadilla, Porto Rico, the ultimate destination (Opinion, p. 6). On each bill of lading was shown the name of the steamer (and its expected sailing date) by which the rice was to go forward from New Orleans (Opinion, pp. 1-2). Each sailing date was subsequent to March 12, 1941 (Opinion, p. 2). The shipments arrived in New Orleans January 26, 1941, the Waterman Steamship Corporation was notified thereof and rice was unloaded into the Railroad's depot (Opinion, p. 2). The depot and the contents thereof, including the rice, were burned on March 12, 1941 (Opinion, p. 2). Plaintiff, as owner of the rice, brought the suit for its value, plus certain penalties (Opinion, p. 2). The contention of the Rail-

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road was that at the time of the fire its relationship to the goods was that of a warehouseman and not a common carrier, and that it was not guilty of negligence in the premises (Opinion, p. 3).

The Trial Court held against plaintiff, dismissing his suit. On appeal to the Supreme Court of Louisiana, that Court reversed the judgment and on May 26, 1947, entered judgment in favor of plaintiff and against the Railroad Company for the amount claimed, plus penalties, but affirmed as to the Warehouses Corporation (Opinion, p. 16). Neither the Railroad Company nor plaintiff, by application for rehearing or otherwise, questioned the propriety of the judgment of affirmance as to the Warehouses Corporation. The Supreme Court's holding against the Railroad Company was based not on a finding of negligence, but on the conclusion of law that its relationship to the goods at the time of the fire was that of a common carrier, and not that of a warehouseman. Application for rehearing by the Railroad Company was denied June 16, 1947. The Chief Justice of the State Supreme Court, on June 17, 1947, entered an order allowing the present appeal.

III.

SPECIFICATION OF ERRORS.

The first error relied on is that the Louisiana Court held the Appellant liable for three penalties of $50.00 each for failure to pay within 30 days, after the filing thereof, claims for loss of property or freight in accordance with

Louisiana *Act 29 of 1908*,* billed from Crowley, Louisiana, to Aguadilla, Porto Rico, under through export bills of lading in form prescribed by the Interstate Commerce Commission, the loss complained of occurring while the said shipments were being held by Appellant in warehouse at New Orleans, Louisiana, awaiting arrival of the steamers on which the shipments were to go to ultimate destination. This holding by the State Court sustaining the constitutionality of the said State statute was made adversely to Appellant's contention that the Louisiana statute, if applied to the shipments in question, would be violative of and repugnant to the Commerce Clause of the Constitution of the United States.

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*"AN ACT To regulate the manner in which common carriers doing business in this State shall adjust claims for loss of or damage to freight and providing penalties for failure to settle same within time prescribed and for collection thereof.

Section 1. Be it enacted by the General Assembly of the State of Louisiana that every claim for loss of or damage to property or freight while in the possession of any common carrier doing business in this State shall be adjusted and paid within thirty (30) days in case of shipments wholly within the State and within sixty (60) days in case of shipments from without the State after the filing of such claim with the agent of such common carrier at the point of destination of such shipment provided that no such claim shall be filed until after the arrival of the shipment or some part thereof at the point of destination or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage together with legal interest thereon from the date of the filing of the claim therefor until the payment thereof.

Section 2. Be it further enacted, etc., That in case of failure of such common carrier to adjust and pay such claim within the periods respectively herein prescribed such failure shall subject such common carrier so failing to a penalty of Fifty (50) Dollars for each and every failure to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction; provided that unless said consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage with legal interest as aforesaid; provided, further that no common carrier shall be liable under this Act for freight or property which never came into its possession.

Section 3. Be it further enacted, etc., That this Act shall go into effect from date of its promulgation, and that all laws or parts of laws in conflict therewith be and the same are hereby repealed."

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The other error of which we complain is that the State Court held, as a matter of law, that when the said shipments were destroyed by fire in New Orleans, on March 12, 1941, Appellant's relation to them was that of a common carrier and not a warehouseman, and that therefore Appellant was liable without a finding of negligence.

Appellee has moved to dismiss or affirm the present appeal; and in answering the contentions urged in support of such motion, we shall deal with the two points in the order above stated.

IV.

ARGUMENT.

(a) The State Penalty Statute.

At the beginning of their motion to dismiss or affirm counsel say that Appellee has waived the penalties and has entered a remittitur in regard thereto in the State Court. It is true that a motion for a remittitur was filed, but the order thereon was not signed by the Chief Justice of the said Court. Obviously the order could not have been signed because the State Court no longer had jurisdiction for two reasons (a) that the judgment of the State Court was entered May 26, 1947, application for rehearing was denied June 16, 1947, at which time the judgment became final, and the remittitur motion was not filed or presented until June 27, 1947, and (b) any jurisdiction the Louisiana Court might have had was clearly lost when the Chief Justice, on June 17, 1947, signed the order allowing this appeal.

Accordingly, the penalties still remain included in the judgment.

That the allowance of said penalties violated the Commerce Clause of the Federal Constitution is demonstrated in the following manner:

Under the Commerce Clause *(Article I, Section 8 of the Constitution)* "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States * * *". The power so given to Congress was exercised by the passage of the *Interstate Commerce Act* (Act of February 4, 1887, 24 Stat. L. 379, 49 U. S. C.) and various amendments thereto. *Section 1 (6)* of the said Act requires all common carriers to

> "* * * establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form and substance of * * * bills of lading * * *."

By *Section 12 (1)* of the Act the Interstate Commerce Commission is required, *inter alia*, to "enforce the provisions of this Chapter". Under *Section 15 (1)* of the Act the Commission is empowered

> "* * * to determine and prescribe what * * * practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

Also it is provided by *Section 20 (5)* of the Act that

> "The commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers * * * including the accounts, records, and memoranda of the movement of traffic * * *."

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Pursuant to the powers thus given to it, the Commission prescribed the form and conditions of various types of bills of lading. In *"Export Bill of Lading. In the Matter of Bills of Lading"*, 64 I. C. C. 347, the Commission dealt with the particular type of bill of lading and prescribed the uniform bill of lading with which we are concerned. The precise form prescribed is set out in Appendix D, facing page 356. This form is, so far as any clauses relevant to this controversy are concerned, the form used in connection with the shipments involved in this suit.

Section 3 (b) of Part I of the bills of lading provided that:

> "The amount of any loss or damage, including loss or damage arising from delay for which any carrier is liable, shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading * * *."

That the Interstate Commerce Act applies to shipments under through export bills of lading on the movement from the point of origin within a state to the port of export within the same state has repeatedly been held. *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498; *Pennsylvania Railroad Company v. Public Utilities Commission of Ohio*, 298 U. S. 170; *Texas and Pacific Railway Company v. Railroad Commission of Louisiana*, 183 Federal 1005, 1007.

In holding unconstitutional an almost identical statute of South Carolina in *Charleston & Western Carolina Rail-*

way Company v. Varnville Furniture Company, 237 U. S. 597, this Court said at page 604:

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. Southern Ry. v. Reid, 222 U. S. 424, 443. But that is immaterial. **When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.** Chicago, Rock Island & Pacific Ry. v. Hardwick Elevator Co., 226 U. S. 426, 435. Southern Railway v. Indiana Railroad Commission, 236 U. S. 439, 446, 447. The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack Amendment saving the rights of holders of bills of lading under existing law. Adams Express Co. v. Croninger, 226 U. S. 491, 506, 507." (Emphasis ours.)

While *Missouri Pacific Railroad Company v. Porter*, 273 U. S. 341, did not involve consideration of a state penalty statute, but the applicability of a state statute under which a bill of lading provision as to non-liability for destruction by fire would have been invalid, which statute this Court held unconstitutional, much that is said in the opinion in that case is applicable to the present controversy. We quote from pages 343-4 as follows:

> "The power of Congress under the commerce clause to regulate bills of lading in respect of such shipments is not questioned; and, if it has entered the field of such regulation, the state statute is thereby

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superseded. The Interstate Commerce Act extends to the plaintiff in error and to the other railroads named in the bill of lading over which the cotton was to have been transported from Earle, Arkansas, to the port of Brunswick, Georgia, and it also extends to the interstate transportation over the inland route constituting a part of the movement in foreign commerce. §1 (1), (2) and (3), 41 Stat. 474. Among other things, the Act requires all carriers subject to it to establish and enforce just and reasonable regulations affecting the issuance, form and substance of bills of lading. §1 (6). 41 Stat. 475. It directs the Interstate Commerce Commission to keep informed as to the manner and method in which the business of carrier is conducted, and 'to execute and enforce the provisions of' the Act. §12. 25 Stat. 858. It provides that whenever, after hearing, the commission shall be of opinion that any 'regulation or practice whatsoever' of the carriers is unjust or unreasonable it may determine and prescribe what is just, fair and reasonable, and may make an order requiring the carriers to observe the regulation or practice prescribed. §15. 41 Stat. 484. The Act requires a carrier receiving property for transportation from a point in one State to a point in another State or from a point in the United States to a point in an adjacent foreign country to issue bills of lading therefor; and, to some extent, it regulates their provisions affecting the liability of carriers. §20 (11)—Carmack and Cummins Amendments. 38 Stat. 1197."

From the same opinion we quote also from pages 345-6 as follows:

"The question is whether Congress has entered upon the regulation of provisions in bills of lading

affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country. All of the provisions referred to were in force when the cotton was delivered to plaintiff in error. No Act of Congress or order of the commission prescribed a form of bill of lading for this shipment. Cf. In the Matter of Bills of Lading, 64 I. C. C. 347, et seq.; Alaska S. S. Co. v. United States, 259 Fed. 713; same case, 253 U. S. 113. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment, or §25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section 1 (6) extends to all carriers and to all transportation subject to the Act; it prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable. And the commission is empowered and directed to enforce the rule.

"The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in

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> opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. Napier v. Atlantic Coast Line Ry. Co., 272 U. S. 605; Oregon-Washington Co. v. Washington, 270 U. S. 87, 102; Penna. R. R. Co. v. Pub. Service Comm., 250 U. S. 566; Charleston & Car. R. R. Co. v. Varnville Co., 237 U. S. 597, 604; Adams Express Co. v. Croninger, 226 U. S. 491, 505; Nor. Pac. Ry. v. Washington, 222 U. S. 370, 378; Prigg v. Pennsylvania, 16 Pet. 539, 617, 618; Houston v. Moore, 5 Wheat. 1, 21, 22." (p. 345-6.)

With regard to the statement in the foregoing quotation that

> "No * * * order of the Commission prescribed a form of bill of lading for this shipment"

we call attention to the fact that the shipment was made October 21, 1920, whereas the Commission's order prescribing the form of through export bills of lading was not entered until exactly one year later. *Export Bill of Lading, In the Matter of Bills of Lading*, 64 I. C. C. 347.

As to *Atlantic Coast Line Railroad Company v. Mazursky*, 216 U. S. 122 and *Missouri, Kansas & Texas Railway Company of Texas v. Harris*, 234 U. S. 412, the one upholding the validity of a similar penalty statute and the other the validity of a statute assessing attorney's fees, relied on by counsel in his motion to dismiss or affirm, while we would think that the theory underlying these decisions was abandoned in the subsequent *Varnville Furniture* case, they are definitely distinguishable in that they were decided long before the Interstate Commerce

Commission entered orders prescribing forms of bills of lading. Incidentally at pages 417 and 422 of the Harris opinion it was clearly recognized that the power of the State to enact a statute of the type in question could be exercised only so long as the Federal Government did not enter the particular field.

Once the Commission prescribed the form of bill of lading, including a provision as to the basis of recovery (Section 3 (b), Part I) the States were, under the Commerce Clause, barred from further regulation in that regard.

Obviously the effect of the Louisiana Statute is to require, in regard to any claim not paid within the time limit fixed, the payment of $50.00 more than is contemplated by the bill of lading provision. It is further submitted that the effect of such a statute would be to give to shippers in Louisiana an advantage over shippers in any other State where there is no similar statute, which would constitute a violation of the discrimination provisions of *Section 13 (4)* of the Interstate Commerce Act.

That the issue raised is not a trifling technicality but a question of substantial importance to all railroads can not be denied, for it would be present in every claim made under a through export bill of lading in any State having a similar penalty statute, provided the investigation could not be completed within the time limit fixed by the statute, or provided the courts should hold against the carrier.

That Appellee may now be willing to waive the penalties does not protect Appellant, which has against it a

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final judgment of the highest court of the State sustaining the validity of the statute. We are entitled to and we respectfully seek a judgment of this Court reversing the State Court and holding the State statute unconstitutional as applied to the shipments in question.

(b) The Warehouseman Issue.

As found by the State Supreme Court, the facts were:

The shipments were made from Crowley, Louisiana, on January 25, 1941 (Opinion, page 1) and reached New Orleans, Louisiana, on January 26, 1941 (Opinion, page 2). On the following day they were unloaded from the cars into the railroad's freight depot and were there stored (Opinion, page 2). Notice of arrival of shipments in New Orleans was addressed to Waterman Steamship Company on January 26, 1941, and was received by that Company in due course (Opinion, page 2). One of the bills of lading provided that the shipment was to go forward from New Orleans by the Steamer Kofresi, sailing on March 14, 1941, another by the Steamer Afoundria sailing on March 28, 1941, and the third by the Steamer Maiden Creek on April 11, 1941 (Opinion, page 2). On March 11, 1941, the Steamship Company mailed to the railroad company a written request for the delivery to the vessel of the consignment to be shipped via its Steamer Kofresi, scheduled to berth at the foot of Celeste and Market Streets, some two miles from the warehouse and to sail on March 14 (Opinion, page 2). These instructions for the delivery of the rice to the vessel were received by the railroad on the following day (Opinion, page 2). At

eight o'clock that night the warehouse in which the rice was stored caught fire and certain of its contents, including these consignments of rice, were completely destroyed (Opinion, page 2).

Under the applicable tariff the free time allowed in New Orleans was 7 days (Opinion, page 9).

The bill of lading covering each of the shipments was the Uniform Through Export Bill of Lading (Opinion, page 6). Each such bill provided that the property described therein is

> "To be carried to the port (A) of New Orleans, La., and thence by Waterman SS Line to the port (B) Aguadilla, P. R." (Opinion, page 6.)
>
> * * * * * * *
>
> "* * * the bills are divided into three parts. Part I deals with the service to be furnished until delivery at Port A (New Orleans). Part II deals with the service after delivery at Port A and until delivery at Port B (Aguadilla, Puerto Rico). Part III has reference to the service to be furnished after delivery at Port B and until delivery at the ultimate destination. Obviously the only part of the bills with which we are here concerned is Part I." (Opinion, page 7.)

Part I of the bills of lading contains the following pertinent provisions:

> "1 (b) * * * The carrier's liability shall be that of a warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such

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free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made * * *."

"5 (a) Property not removed by the exporting carrier, or the party entitled to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property, for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as a warehouseman, only, or, at the option of the carrier, may be removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

"10 (a) No carrier shall be liable for delay not occurring on its own line, or not the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance and after proper tender of delivery to the next connecting carrier has been made, and if the whole or any part of the property specified herein be prevented by any cause from going from the port of export in the vessel for which intended, the carrier here-

under then in possession is at liberty to forward said property by another vessel of the ocean carrier, or, if deemed necessary, by any other vessel, dispatching notice thereof to the shipper and consignee."

"(b) It shall be the duty of the carrier by railroad to deliver such property to the vessel as a part of its undertaking as a common carrier." (Opinion, pages 7-8.)

It was on these facts that the Louisiana Court held that, as a matter of law, Appellant's relationship to the shipments at the time of the fire on March 12, 1941, was that of a common carrier and not, as contended by Appellant, that of a warehouseman, which would have meant that in order to hold it liable negligence would have to be found, and there was no such findings.

The salient portions of the foregoing bill of lading provisions are:

"1 (b) * * * The carrier's liability shall be that of a warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time * * * after notice of the arrival of the property * * * at the port of export * * * has been duly sent * * * and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made * * *."

"5 (a) Property not removed by the exporting carrier * * * within the free time allowed * * * after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party en-

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titled to receive it has been made, may be kept in * * * depot * * * subject to * * * the carrier's responsibility as a warehouseman, only * * *."

"10 (a) No carrier shall be liable * * * in any respect other than as warehouseman, while the property awaits further conveyance and after proper tender of delivery to the next connecting carrier has been made * * *."

The form of the bills of lading had been prescribed by the order of the Interstate Commerce Commission in *"Export Bill of Lading, In the Matter of Bills of Lading"*, 64 I. C. C. 347, the precise form of the Uniform Export Bill of Lading being set out in Appendix D, facing page 356. The clauses under consideration in the bills of lading involved in this suit are exactly as prescribed in 64 I. C. C. 347, 356. We mention this because, as a result of subsequent hearings, the Commission prescribed changes in some of the other provisions, chiefly, if not entirely, in Part II of the bill of lading, but certainly none with regard to the three clauses on which we rely.

As pointed out in our argument under our first assignment, in prescribing the form of bills of lading the Commission acted under the authority conferred on it by the Interstate Commerce Act; and in enacting that Act Congress exercised the power vested in it by the Commerce Clause of the Constitution.

The Louisiana Court was put on notice of the bill of lading provisions, the report and order of the Commission prescribing the form thereof, the applicable provisions of

the Interstate Commerce Act (particularly Sections 1 (6), 12 (1), 15 (1) and 20 (5), which are discussed and from which we quote in our argument under our first assignment); and in interpreting these orders of the Commission and these provisions of the Interstate Commerce Act so as to hold Appellant's obligations to be those of a common carrier rather than those of a warehouseman, the Louisiana Court deprived Appellant of the benefit of the said Federal regulations and the Federal statute enacted under the authority given Congress by the Commerce Clause of the Constitution, thus clearly presenting a substantial Federal question for review by this Court.

Referring to Appellant Railroad, the Louisiana Court said at the bottom of page 12 of its opinion that

> "The first carrier does not, by unloading the goods at the end of its line, become a mere warehouseman. The shipper who delivers his goods to a common carrier has a right to understand that the liability of an insurer is upon some carrier during the whole period of the transit."

This concept that "the liability of an insurer is upon some carrier during the whole period of transit" is, we respectfully submit, fundamentally erroneous when applied to the present shipments under the Uniform Export Bills of Lading. Precisely the contrary was recognized as proper by the Commission and precisely the contrary was prescribed by it in the form the Uniform Export Bills of Lading, and particularly by the clauses thereof on which we rely.

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The Louisiana Court's conclusion (Opinion, page 13) that

> "* * * the arrival of the rice in New Orleans, notice of such arrival to the Waterman Steamship Line, and the placement of this rice in its warehouse by the defendant railroad did not constitute the notice and placement for delivery or tender contemplated by clause 1 (b) of Part I of the bills of lading—clauses 5 (a) and 10 (a) having no application here—under which they were transported to operate as a release of the carrier's common law liability as insurer of the goods,"

is, we respectfully submit, wrong in various regards.

We can not understand how the Louisiana Court reached the conclusion that clauses 5 (a) and 10 (a) of the bills of lading have no application here. It is, we submit, clear that the carrier could plead all or any of the said clauses. At the end of the bills of lading we find the following language (prescribed by the Commission):

> "And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

Thus clauses 5 (a) and 10 (a) could not be disregarded.

The trouble with the opinion of the Louisiana Court is that it is not realistic in seeking to maintain Appellant's common carrier liability until delivery to the steamer and in expecting Appellant to do something more than was

actually done in order to reduce its liability to that of warehouseman.

It is obvious that a shipment from an inland point to a foreign destination, involving a rail and water movement, is very different from a shipment between two points in this country involving a haul over two or more railroads. In the latter situation when one railroad handles the shipment to the connection with the next railroad, delivery to the second railroad and forwarding by it is a normal routine affair. At all times the railroads are charged with the duty of proceeding with the transportation of the goods to final destination. However, when we deal with an export shipment the rail line can rarely make immediate delivery to the steamship line because such delivery cannot be made until the steamer is in port and ready to take on cargo. Accordingly, at the port of export the railroad has to hold the goods pending their delivery to the steamer. Clearly its duty to take steps to advance the transportation of the goods is suspended until the arrival of the steamer. It would, indeed, be harsh if in this interval of forced inactivity it is to be regarded as a common carrier. Please note that here the three shipments were made on January 25, 1941, under bills of lading that did not contemplate their leaving New Orleans until March 14, March 22 and April 11, respectively. They arrived in New Orleans on January 26th and so had been there a month and a half before March 12, when the fire occurred. The Waterman Line was immediately notified of the arrival in New Orleans of the shipments and they were promptly put on storage in Appellant's depot. That no other action was expected of Appellant by Waterman is

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shown by the fact that just before the fire Waterman requested the delivery to the steamer of the shipment that was expected to go forward on March 14. This request of Waterman's would seem to have been a recognition of clause 5 (a).**

What more was Appellant to do? Surely it was not expected to haul the goods to the wharf and there make a physical tender of delivery. All parties knew that the rice was to go forward by steamers scheduled to sail on dates all subsequent to March 12. The function of a notice of arrival is to advise the receiver that the goods are available to him. To suggest that there should be another document formally advising the receiver that the goods are herewith tendered to him would entail the doing of a vain and useless thing.

That the free time had run long before March 12 is obvious. There was certainly placement in the depot.

As to clause 1 (b) of the bills of lading, there was notice of arrival and placement, and while there need be either placement or tender, and not both, the real practical effect of the notice was to make tender.

Apparently the chief difference in the requirements of 1 (b) and 5 (a) is that in the latter the reduction of lia-

** Parenthetically, we may remark that there is no finding by the Louisiana Court that there was any duty on Appellant to make delivery of this one shipment to the wharf prior to the fire. The decision in no way differentiated this shipment from the other two. Our position was and is that Appellant could not deliver this shipment to the wharf until the Steamer was ready to receive it, and that up to that time its relationship to the shipment continued to be that of a warehouseman.

bility to warehouseman does not occur until after the running of the free time. As that had run, what was said as to 1 (b) applies equally to 5 (a).

In order to reduce its liability to that of warehouseman under 10 (a) all that was required was to make proper tender of delivery to Waterman, the next connecting carrier. It is respectfully submitted that was exactly what the so-called notice of arrival did.

The Louisiana Court was apparently troubled by the fact that on arrival of the steamer appellant was, as to each shipment, charged with the duty of making delivery of the goods at the wharf some two miles from the depot, from which fact it concluded that Appellant had not completed its common carrier obligations and apparently therefore could not become a warehouseman. It is submitted that as a practical matter the goods had to be stored in Appellant's depot, pending the arrival of the steamers, and that during this interval there was no duty on appellant to proceed with the transportation of the goods. In other words during the interval the common carrier obligation was suspended and Appellant's responsibility was reduced to that of warehouseman exactly as contemplated by the bill of lading provisions on which we rely and as intended by the Commission in prescribing those provisions.

In holding Appellant liable as a common carrier, the Louisiana Court committed an error of law clearly presenting a Federal question. That the question is of substance will be appreciated when it is realized that it will

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be presented every time a shipment under the through export bill of lading is damaged or destroyed after arrival at the port of export and before delivery to the steamer.

The bill of lading provisions relied on were specifically pleaded in the original answer of Appellant, and it was specifically pleaded that on March 12, 1941, its responsibility had been reduced to that of Warehouseman. Throughout the litigation these contentions were continuously urged. They were made on brief and in argument in the Trial Court. They were made on brief and in argument before the Louisiana Supreme Court. That Court ruled against these contentions. They were reurged in application for a rehearing and brief in support thereof. In denying such application, the Louisiana Supreme Court has left us no remedy but to appeal to the Supreme Court of the United States for its ruling on the very questions we raised at every possible opportunity throughout the litigation, which questions are indeed the fundamental issues in this suit.

If the provisions of the bills of lading relied on are subject to the interpretation put on them by the Louisiana Court then and in that event it is high time to consider what steps should be taken to have such provisions redrafted. On a question of such importance the authoritative voice of this Court should speak.

It may be that this particular issue was more properly covered by section 237 (b) of the Judicial Code, but we believed that since our constitutional point was clearly covered by section 237 (a) it would be better to deal with

the two points together and rely on the provisions of Section 237 (c) as to treating as an application for certiorari an appeal improperly taken.

In conclusion, we submit that Appellee's motion to dismiss or affirm should be denied, and that the present appeal should be entertained by this Court.

Respectfully submitted,

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New Orleans, July 12, 1947.

CERTIFICATE.

I hereby certify that copy of the foregoing brief has been served on V. Rivera S. en C., Appellee, by delivery of a copy thereof to Messrs. Deutsch, Kerrigan & Stiles, counsel of record for said Appellee, on July 12, 1947.

....,
HARRY McCALL,
Attorney for Texas and New Orleans Railroad Company,
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New Orleans, July 12, 1947.

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